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Supreme Court, U.S.
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No. A-174

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

BAYARD SPECTOR,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED FOR REVIEW

I. Whether it was proper to withhold from the defense contemporaneous tape-recorded logs of the informant-witness's activities on behalf of the government in connection with this case on the ground that the tapes were protected by the attorney-client privilege and over the Petitioner's claims that they were never privileged, that the privilege was waived, and that the tapes were essential to his cross-examination of the witness, who, because of his contingency agreement with the government, had an unusually compelling incentive to lie in order to insure Petitioner's conviction.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINION BELOW.....vii

JURISDICTION OF THE COURT.....vii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....viii

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING THE WRIT.....13

CONCLUSION.....51

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit, United States v. Spector, 793 F.2d 932 (8th Cir. 1986).....A-1

Order of the United States Court of Appeals for the Eighth Circuit denying rehearing and rehearing en banc (July 15, 1986).....A-38

Order extending time to file petition for writ of certiorari (September 8, 1986).....A-39

TABLE OF AUTHORITIES

Ayers v. Watson, 132 U.S. 394 (1889).....29

Berger v. United States, 295 U.S. 78 (1935).....32

Branzburg v. Hayes, 408 U.S. 665 (1972).....21

Campbell v. United States, 373 U.S. 487 (1973).....30

Chambers v. Mississippi, 410 U.S. 284.....22

Clancy v. United States, 365 U.S. 312 (1961).....30

Davis v. Alaska, 415 U.S. 308 (1974).....22

Fisher v. United States, 425 U.S. 391 (1976).....34,38

Grunewald v. United States, 353 U.S. 391 (1957).....29

Herbert v. Lando, 441 U.S. 153 (1979).....34

Hoffa v. United States, 385 U.S. 293 (1966).....27

Hunt v. Blackburn, 128 U.S. 464 (1888).....34

In re Horowitz, 482 F.2d 72 (2d Cir.), cert. denied, 414 U.S. 867 (1973).....35

Jencks v. United States, 353 U.S. 657 (1957).....29,30

Lee v. Illinois, 106 S.Ct. 2056 (1986).....43

Nix v. Whiteside, 106 S.Ct. 988 (1986)...21,36

Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830 (E.D. Pa. 1962).....35

Pointer v. Texas, 380 U.S. 400 (1965).....43

Roviaro v. United States, 353 U.S. 53 (1957).....23

State v. von Bulow, 475 A.2d 995 (R.I.), cert. denied, 105 S.Ct. 233 (1984).....41

Trammel v. United States, 445 U.S. 40 (1980).....34

United States v. Agurs, 427 U.S. 93 (1976).....48

United States v. Aronoff, 466 F.Supp. 855 (S.D.N.Y. 1979).....41

United States v. Bagley, 105 S.Ct. 3375 (1985).....25

United States v. Cervantes-Pacheco, 793 F.2d 689 (5th Cir. 1986).....26

United States v. Dailey, 759 F.2d 192 (1st Cir. 1985).....25,27

United States v. Fallon, 776 F.2d 727 (7th Cir. 1985).....27

United States v. Hales, 422 U.S. 171 (1975).....29

United States v. Jones, 696 F.2d 1069 (4th Cir. 1982).....40

United States v. Neal, 536 F.2d 533 (2d Cir.), cert. denied, 429 U.S. 857 (1976).....26

United States v. Nixon, 418 U.S. 683 (1974).....21

United States v. (Under Seal), 748 F.2d 871 (4th Cir. 1984).....41

United States v. Valle-Ferrer, 739 F.2d 545 (11th Cir. 1984).....26

United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 2138 (1985).....25,27

Upjohn Co. v. United States, 449 U.S. 383 (1981).....34,35

Washington v. Texas, 388 U.S. 14 (1967).....22

Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965).....26

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Amend. V.....passim
U.S. Const., Amend. VI.....passim

Fed. R. Evid. 501.....33

OTHER AUTHORITIES

8 J. Wigmore, Evidence §2290
(McNaughton rev. 1961).....33

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in United States v. Spector is reported at 793 F.2d 932 (8th Cir. 1986), and is reproduced in the Appendix at A-1.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals was entered on June 16, 1986. (A-1) That Court denied a petition for rehearing and rehearing en banc by order dated July 15, 1986. (A-38) By order of this Court dated September 8, 1986, the time for filing the petition for certiorari was extended to October 13, 1986. (A-39)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. V:

> ...nor deprived of life, liberty, or property, without due process of law....

U.S. Const., Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....

Fed. R. Evid. 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT OF THE CASE

Petitioner Bayard Spector and four others were indicted by a federal grand jury and charged with violations of the nation's narcotics laws. Spector was convicted of the two counts in which he was charged. The first, a conspiracy count, charged that between April 1, 1984 and May 1, 1984, Petitioner, George Kelly, Jr., Vinson Rood, Philip Rima and Bruce Cohen conspired to distribute cocaine in St. Louis, Missouri, in violation of 21 U.S.C. §§846 and 841(a)(1). The other charged that on April 30, 1984 and May 1, 1984, Petitioner, Kelly, Rood and Rima traveled in interstate commerce, in violation of 18 U.S.C. §1952(a)(3), with intent to promote an unlawful activity: possession with

intent to distribute cocaine, and thereafter attempted to perform the promotion of the unlawful activity.[1]

The case went to trial against Petitioner alone. Kelly, Rood and Rima had all pled guilty to a single count pursuant to plea agreements with the government; Kelly and Rima both testified against Petitioner. Cohen has never been apprehended.

The central character in the scheme, however, was not any of the persons who were indicted, but one Joe Adams. Because of his narcotics dealings, Joe Adams had come to the attention of federal narcotics agents in St. Louis and had made a deal to develop cases for the government in exchange for a variety of benefits. The deal was set forth in a three-page letter dated December 27, 1983 from the

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[1]The indictment's other counts charged Kelly, Rood, Rima, and Cohen, but not Petitioner, with other crimes.

United States Attorney to Adams' lawyer, David Capes. The agreement provided that, in return for his cooperation, Adams' parents, his children, and his girlfriend would not be prosecuted. Under the agreement, Adams himself could still be indicted, but the agreement limited the charges which might be brought against him to specified ones with penalties not to exceed 45 years imprisonment. Further, under the agreement, whether or not he would be charged with any crimes at all depended on how useful he proved to be to the government in "successfully solving and prosecuting crimes." In the words of the agreement,

> The Government will carefully and in good faith consider and evaluate Mr. Adams cooperation and the information he provides in making its determination whether or not to reduce or forego (sic) some or all of the aforesaid maximum charges and imprisonment exposure. In short, this office will review in good faith the extent and

> value of Mr. Adams' information and cooperation as it relates to successfully solving and prosecuting crimes. The more important we deem that information and cooperation, the more likely the reduction of charges and his sentencing risk.

Viewed in the light most favorable to the government the evidence adduced at trial showed the following. Pursuant to his agreement with the government, Adams traveled to Miami, Florida with the specific intention of creating cases, not helping to solve them. Upon his arrival in early April of 1984, he contacted George Kelly and told him that he had buyers in the St. Louis area who were interested in purchasing 25 kilograms of cocaine every six weeks and who would pay $50,000 a kilo for it, a very high price. Adams asked Kelly if he could supply it; Kelly said he would have to look around for some sources.

Kelly contacted some friends, including Bruce Cohen. Cohen agreed to supply the full amount but he wanted at least $200,000 up front. On April 24, Kelly and Adams flew from Miami to St. Louis where Adams introduced Kelly to the St. Louis buyer, who was, as Adams knew, really a DEA agent. The "buyer" displayed 1.25 million dollars in cash, but refused to front any money. Kelly and Adams returned to Miami, where Cohen, dissatisfied with the buyer's refusal to front the purchase price, agreed to provide initially only two kilos without prepayment.

That same night, Kelly testified, he ran into Petitioner, Bayard Spector, at a restaurant in South Miami where they had a general conversation in which drugs were never mentioned.

The next night, Kelly testified, he saw Spector again at the same restaurant. According to Kelly, he told Spector that he had cocaine buyers in St. Louis who were trying to purchase 25 kilos; according to Kelly, Spector said he could supply it.

Kelly testified that, the next day, Spector told him he could do five to ten kilos. Kelly contacted Adams to report that he would get two kilos from Cohen and between five and ten kilos from Spector. Rima agreed to provide one kilo.

On Saturday morning, April 28, according to Kelly, the plans were finalized. Cohen's two kilos and Rima's single kilo were delivered, consolidated, packaged and then concealed in the car of Vinson Rood, a friend of Rima's. Spector was present for none of this and, furthermore, according to the witnesses, had no knowledge of it. Rood set

off driving from Miami to St. Louis with the three kilos. Meanwhile, Adams, Rima and Kelly (but not Spector) flew from Miami to St. Louis, and checked into the Presidential suite at the St. Louis Marriott hotel on April 30. They predicted that Rood and the three kilograms of cocaine would be arriving in St. Louis the afternoon of the following day, May 1. While waiting, Kelly, Adams and Rima discussed the deal, and the profit split. Kelly made some notes, which indicated Spector's participation. Rood called the Marriott to report that he had arrived. He checked into the Ramada Inn, across the river, in Illinois.

Petitioner Spector, who had not traveled to St. Louis with Adams, Kelly, Rima or Rood, arrived at the Marriott Hotel suite early in the evening of May 1. According to Kelly, Rima and Adams, there was a discussion of

their deal and an offer was made to allow Spector to participate in future business transactions with the St. Louis buyers on a monthly basis. According to Kelly, Spector then went into the bathroom. Immediately thereafter Spector left the suite, saying that he was going out for a drink. Adams then went into the side room of the suite and then he left as well. According to Adams, the transmitting device which was in his jacket pocket had been discovered. The government never produced any transmitting device that Adams allegedly had in his possession. Spector left the Marriott and was arrested entering another hotel at which he was staying. Agents searched both him and his hotel room but found no cocaine nor anything else of an incriminating nature. Kelly and Rima were arrested in the Marriott suite. Rood, who had been under surveillance, was

also arrested and the three kilograms of cocaine provided by Rima and Cohen were seized.

Spector's defense was that there was, indeed, a narcotics deal, but that he was not a part of it. As demonstrated by the testimony of an official of the Monsanto Company, Spector was in St. Louis not to consummate a cocaine deal, but for a thermoplastics business meeting which had been scheduled prior to Kelly's first chance meeting with Spector at the South Miami restaurant. The defense surmised that when Kelly's source, Cohen, agreed to provide only two kilograms without pre-payment, Kelly -- afraid of what Adams and the St. Louis buyers would do if he failed to come through with the full amount of cocaine he had promised and desperate to make it look as if he could deliver the quantity that he had promised --

told Adams that Spector would be providing the additional cocaine. To continue the charade, Kelly, who learned that Spector was going to be in St. Louis, asked Spector to come over to the Marriott for a party. When Spector arrived, he became suspicious that something was going on, and promptly left. Spector had not discussed a cocaine deal with Kelly either in Miami or in the hotel room in St. Louis. Although Adams claimed that there was a transmitter in his jacket pocket, no such transmitter was ever produced. The tape submitted as being from this transmitter contained no conversation concerning cocaine during Spector's presence in the Marriott hotel suite.

In short, Kelly had lied to Adams about Spector having agreed to supply cocaine, and Kelly lied at trial about Spector having agreed to provide cocaine. Further, Adams,

Kelly and Rima all had lied about Spector having discussed the cocaine deal in the Marriott suite. The case against Spector was constructed entirely on those lies.

Petitioner's attempt to cross-examine the witnesses against him was, however, crippled when the trial court, accepting Adams' claim of attorney-client privilege, quashed a defense subpoena served on Adams' attorney seeking the production of Adams' contemporaneously tape-recorded notes. The tapes were a log of Adams' activities on behalf of the government, including, presumably, his meetings and conversations with Kelly in connection with this case.

After deliberating for over eight hours, the jury returned verdicts of guilty. Spector was sentenced to concurrent prison terms of eleven and five years.

The Court of Appeals for the Eighth Circuit affirmed, over Judge Heaney's dissent. (A-1) On July 15, 1986, a petition for rehearing and suggestion for rehearing en banc were denied. (A-38)

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

This case presents the worst example of the much criticized and apparently growing prosecutorial practice of "contingent fee" agreements with its witnesses in criminal cases -- agreements under which the witnesses are promised benefits that depend on the successful outcome of criminal prosecutions. It has been widely recognized that this type of contingent agreement creates an incentive for government witnesses to lie in order to enhance the likelihood of a "successful" prosecution (which the witnesses interpret as a conviction).

The principal tool by which the defense can demonstrate that witnesses with an incentive to lie have, in fact, lied is to cross-examine these witnesses on the basis of all available evidence, including -- indeed

especially -- on the basis of prior statements by the witnesses themselves. Many courts and commentators have grudgingly accepted the contingency agreement as a necessary evil, on the explicit premise that the defense will be given considerable latitude in cross-examining witnesses who have been given an incentive to lie by the government, and in obtaining material necessary for such cross-examination.

In this case, the lower courts not only approved the contingency agreement, but they also denied the defense access to available information necessary for effective cross-examination precisely on the issue of whether the witness was telling the truth. Here the witness had kept a tape recorded diary of "every single step" he took in relation to this case. Its purpose was to demonstrate <u>to the government</u> that he had complied with the agreement. The defense subpoenaed the tapes,

but the trial court quashed the subpoena on the ground that the tapes were somehow protected by the attorney-client privilege. This ruling, supported by the government, denied Petitioner his Constitutional right of confrontation without any real countervailing consideration. In the first place, the tapes were not protected by the attorney-client privilege since they were not intended as a confidential communication between client and lawyer, but rather as proof to the government that the witness had complied with the agreement. In the second place, even if the tapes were somehow covered by the lawyer-client privilege, that privilege was waived by selective and partial disclosure of one of the tapes and by the witness's testimony about the events recorded on the tape. In the third place, even if the tapes were somehow privileged and the privilege was not waived,

the Constitutional right of confrontation generally compels production of material of this kind even in the face of a valid claim of privilege. And finally, even if the privilege is thought to prevail against general claims under the Confrontation Clause, it surely cannot prevail in the narrow and especially compelling case where the witness claiming the privilege has a contingency agreement which has given him an incentive to lie, where his lies can be proved through the very material about which he is invoking the privilege, and where a simple request by the government would produce the tapes.

ARGUMENT

The government's witness Joe Adams had a contingency agreement with the government under which the criminal charges and prison time he would ultimately face -- if any -- depended on how valuable his assistance proved

to be to the government. "Value" was to be measured in terms of "successful" prosecution. To keep track of what he was doing on the government's behalf, and apparently at his attorney's suggestion, Adams kept a journal, a "diary" in the form of tape recordings. These tape recordings, in Adams' own words, recorded "every single step" of his activity in this case. In at least one of his tapes, he recorded not only his own words, but a telephone conversation he had with witness Kelly from a public telephone in the Atlanta airport while Adams was en route from St. Louis to Miami on April 15, the mid-point of the conspiracy charged. Adams gave this tape to the prosecutor and, despite the prosecutor's attempts to suppress it, ultimately it was turned over to the defense.[2]

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[2]The tape was turned over to the defense only after Adams' direct testimony, even though, at least to the extent it recorded Kelly's words,
(footnote continued)

However, Adams gave the other tapes to his attorney, David Capes, who kept them in storage without even having listened to them.[3] He kept them in the belief that they might some day prove useful in connection with his representation of Adams if any dispute arose as to what Adams had actually accomplished for the government. When the defense subpoenaed the tapes from Adams' attorney, the attorney-client privilege was invoked.

The trial judge, without any statement of reasons, rejected the defense claims that the tapes were not privileged and quashed the

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(footnote continued from previous page) it was Jencks Act material as to him which should have been provided before his, Kelly's, cross-examination.

One reason for the government's attempt to suppress the tape may have been that on the tape Adams had referred to Jews in a derogatory and disparaging way. Petitioner is himself a Jew.

[3]Counsel has confirmed that Capes still has those tapes and, apparently, still has not listened to them.

subpoena. On appeal, the majority of the Eighth Circuit panel, treating the issue "summarily," affirmed the ruling that the tapes were privileged because "the attorney-client privilege protects 'communications not intended to be disclosed to third persons other than in the course of rendering legal services to the client.'" (A-22) The majority's opinion does not address the question of waiver or the defendant's Constitutional claim that any privilege must yield in these circumstances, both of which were claims presented to the trial court and to the Court of Appeals.[4]

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[4]The dissenting judge would have reversed the conviction. In his view, the tapes were Jencks Act material; even if originally privileged, the privilege was waived when Adams told the government about the tapes and delivered one of the tapes to it; and, in any event, the assertion of the privilege unduly restricted the defendant's right of cross-examination.

The decision of the Eighth Circuit majority -- denying the defense access to the witness's contemporaneous tape recorded diary of the events in question based on the witness's claim of attorney-client privilege -- misconstrued the relevant body of federal law with respect to the nature and scope of that evidentiary privilege.

More important though, that court failed entirely to consider the tension which exists, in a criminal case, between the assertion of an evidentiary privilege which suppresses highly relevant, potentially exculpatory information and the defendant's Constitutional rights to due process and to confront the witnesses against him. This case thus presents an opportunity for this Court both to provide the federal courts with much-needed guidance on the scope of the attorney-client privilege and the circumstances under which

the privilege is waived or lost and also to consider that ancient evidentiary privilege in the light of modern day methods of prosecuting crime.[5]

This Court's decisions establish that exclusionary or restrictive evidentiary rules and privileges -- and the public policies which they embody or serve -- often must yield to competing interests. This is so where access to information is necessary to vindicate the government's own interest in prosecuting crime. See United States v. Nixon, 418 U.S. 683 (1974) (executive privilege); cf. Branzburg v. Hayes, 408 U.S. 665 (1972) (rejecting newsman's privilege).

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[5]Outside of the corporate context, this Court has not, in recent times, dealt with the scope or operation of the attorney-client privilege, except, indirectly, in Nix v. Whiteside, 106 S.Ct. 988 (1986). Nix establishes that the attorney-client relationship is not inviolate, and that in the search for truth there are circumstances in which an attorney may -- or must -- disclose facts, even those told him, in confidence, by his client.

It is also so, a fortiori, in criminal cases, where the defendant whose liberty is at stake seeks arguably protected information. Fifth and Sixth Amendments rights have frequently been recognized to be paramount to competing evidentiary rules or privileges. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974) (defendant's right of confrontation is paramount to state's policy of protecting juvenile offenders; injury to witness by disclosure of his juvenile record outweighed by Petitioner's right effectively to cross-examine); Chambers v. Mississippi, 410 U.S. 284 (1973) (common law rule that party may not impeach his own witness must yield to defendant's right of confrontation); Washington v. Texas, 388 U.S. 14 (1967) (rule rendering accomplices or co-indictees incompetent to testify in favor of each other violated defendant's Sixth Amendment rights);

Roviaro v. United States, 353 U.S. 53 (1957) (government's privilege to withhold disclosure of informant's identity must give way to fundamental requirements of fairness).

A long line of precedents of this Court thus demonstrates that the ruling of the Court of Appeals that the tapes at issue were "privileged," even if correct, would not end the matter, but only serve as the starting point for a critical inquiry: whether the recognition of the privilege in this case is consistent with the Petitioner's Constitutional rights.

Adams, the government's key witness, had severe credibility problems.[6] He had a long history of prior criminal involvement. He was an informant testifying under a

[6]So did each of the other key witnesses against Petitioner. Co-defendants Rima and Kelly also had substantial criminal backgrounds, and both were testifying pursuant to plea agreements with the government.

contingency agreement which bestowed substantial benefits on both himself and on his loved ones and provided him with substantial incentives to do whatever he believed necessary to insure Petitioner's conviction. Indeed, the extent of his criminal involvement was such that under his agreement with the government he could still be charged with crimes carrying penalties of up to 45 years imprisonment. The magnitude of his incentive to lie was commensurate with his potential exposure: under his agreement, if his assistance to the government was sufficiently useful, the government would "forego" prosecuting any of those crimes.

The contingency agreement is a prosecutorial tool which the federal courts have found troubling. This Court has recognized that agreements under which witnesses are to be rewarded if their

information leads to the accomplishment of the government's objectives to the government's satisfaction give those witnesses "a direct, personal stake" in a defendant's conviction. United States v. Bagley, 105 S.Ct. 3375, 3384 (1985). "The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." Id. For the most part, though, except in particularly egregious cases, the courts have reluctantly accepted such prosecutorial arrangements. See, e.g., United States v. Dailey, 759 F.2d 192 (1st Cir. 1985) (collecting cases); United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 2138 (1985) (vacating panel decision and affirming denial of §2255

petition by an evenly divided vote). But see United States v. Cervantes-Pacheco, 793 F.2d 689 (5th Cir. 1986) (government's arrangement with informant was impermissible 'contingent fee arrangement' that violated defendants' due process); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965) (reversing conviction because of contingency fee agreement between the government and its chief witness).

However, those federal courts which have considered the issue and which have tolerated certain contingency agreements, albeit with substantial reservations, have insisted that the legitimacy of convictions based on testimony of witnesses who have contingency arrangements depends on certain conditions being met. See, e.g., United States v. Valle-Ferrer, 739 F.2d 545 (11th Cir. 1984); United States v. Neal, 536 F.2d 533 (2d Cir.),

cert. denied, 429 U.S. 857 (1976). Given the stake in the outcome and incentive to lie which such agreements inevitably create, the courts require that the witness must at least be subject to wide-open cross-examination. See, e.g., United States v. Fallon, 776 F.2d 727 (7th Cir. 1985); United States v. Dailey, supra, 759 F.2d at 198. Despite the recognized risk of perjury, "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination." Id. at 196, citing Hoffa v. United States, 385 U.S. 293 (1966). But see United States v. Waterman, 732 F.2d 1527, 1531 vacated by 4-4 en banc decision, affirming the district court's judgment, 732 F.2d 1533 (8th Cir. 1984), cert. denied, 105 S.Ct. 2138 (1985) (offer of favorable treatment to prosecution witness contingent upon success of prosecution is "nothing more

than an invitation to perjury having no place in our constitutional system"; disclosure of the agreement and an opportunity for cross-examination do not cure the harm).

In this case, though, the Petitioner was denied the very information which would have permitted him to impeach Adams -- Adams' own essentially contemporaneous notes of the events at issue.[7]

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[7]The tapes, which are still held, unheard, by Adams' attorney, may also contradict Kelly's version of the events. The one tape which was produced recorded Adams' notes of a meeting with Kelly at a particular restaurant on a particular day. (In Kelly's testimony, he failed to mention that meeting although he was interrogated about all of his dealings with Adams. Because of the belated disclosure of the tape to the defense, it was, however, impossible for the defense to cross-examine Kelly about that meeting.)

Indeed, there are no assurances that there are no other persons taped on the suppressed tapes. Neither Adams' attorney, nor the government's attorney, nor any judge has heard the tapes. Their contents are known only to Adams whose credibility is, to say the least, subject to serious doubt.

This Court has long recognized the usefulness of a witness' former declaration to impeach or contradict. See Ayers v. Watson, 132 U.S. 394 (1889). The propriety of using prior inconsistent statements to impeach a witness has been called "a basic rule of evidence," United States v. Hales, 422 U.S. 171, 176 (1975), and "an elementary one." Grunewald v. United States, 353 U.S. 391 (1957). As this Court said in Jencks v. United States, 353 U.S. 657, 665 (1957), in ruling that witness's reports made to the government immediately following the critical events "while the events were still fresh in [the witness's] mind" should have been turned over to the defense, or the criminal action dismissed:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the

> witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Id. at 667. See also Campbell v. United States, 373 U.S. 487 (1963); Clancy v. United States, 365 U.S. 312 (1961).

Prior statements of witnesses can be used to impeach only when the defense has access to them, and Jencks holds that access may be compelled even over a claim of privilege. 353 U.S. at 670. Thus, the Court in Jencks made plain that evidentiary privileges, even those based on notions of confidentiality, must often give way to the rights of a criminal defendant.

> [I]n criminal causes '...the Government can invoke its evidentiary privileges only at

> the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to the defense....'

Id. at 671. In this case, to be sure, while the government did not invoke any privilege to withhold from disclosure the Adams tapes, the result must be the same. Adams turned one of the tapes over to the government and there is no reason to believe (especially given his obligation to cooperate and what he stood to gain by cooperating) that he would not have turned over the others -- indistinguishable from the first -- had he been asked to do that. Had he done so, they would plainly have been discoverable Jencks Act material. Under the circumstances, the government's calculated

refusal to ask for them is functionally equivalent to the government's having had them and having failed to turn them over to the defense.[8] The interest of the United States in a criminal prosecution is "not that it shall win a case, but that justice shall be done..." Berger v. United States, 295 U.S. 78, 88 (1935).[9]

Even if the prosecutor's role is disregarded and the problem is viewed strictly as a dispute between the Petitioner and Adams, the result must be the same. Assuming that there is an evidentiary privilege here, the privilege, one not even rooted in any Constitutional guarantee, must yield.

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[8]Indeed, the dissenting judge would have found all of the tapes to be Jencks Act statements.

[9]Although the government had no legitimate interest in blocking Petitioner's access to Adams' tapes, the prosecutor supported the claim of attorney-client privilege and resisted production even of the tape she had in her possession.

Petitioner submits however that the clash is largely an illusory one. The witness's tapes were never privileged and even if they once were, the privilege was lost through the witness's relationship with the government (including his voluntary giving of one tape to the prosecutor) and by his trial testimony about the same events which he described on the tapes. These too are questions of substantial importance to the operation of the criminal justice system.

Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence §2290

(McNaughton rev. 196[illegible]51). Its purpose is to encourage full and [illegible]frank communication between attorneys and their [illegible]clients and thereby promote broader pub[illegible]lic interests in the observance of law a[illegible]nd administration of justice. "The lawye[illegible]r-client privilege rests on the need for the [illegible]advocate and counselor to know all that relate[illegible]s to the client's reasons for seeking represe[illegible]ntation if the professional mission is to be ca[illegible]rried out." Trammel v. United States, 445 [illegible]U.S. 40, 51 (1980). See also Fisher v. Unite[illegible]d States, 425 U.S. 391, 403 (1976); Hunt v. [illegible]Blackburn, 128 U.S. 464, 470 (1888); Upjohn C[illegible]o. v. United States, 449 U.S. 383, 389 (1981[illegible]).

However, the e[illegible]videntiary privileges are, in this Court's wor[illegible]ds, "not favored." Herbert v. Lando, 441 U.S. [illegible]153, 175 (1979). As Professor Wigmore a[illegible]dmonished, the attorney-client privileges "[illegible]ought to be strictly

confined within the narrowest possible limits consistent with the logic of its principle," since it is "in derogation of the public's right to every man's evidence." In re Horowitz, 482 F.2d 72, 81-82 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

At the very least, the privileged nature of Adams' tapes is highly problematic. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. Upjohn Co. v. United States, supra, 449 U.S. at 395. "A fact is one thing and a communication concerning that fact is an entirely different thing." Id., quoting Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (E.D. Pa. 1962). And it borders on the bizarre to recognize as confidential a

"communication" which the attorney, who is merely warehousing the tape, has not even heard.

What has happened here is especially troubling. Merely by giving the tapes to his attorney, Adams has effectively managed to hide the truth and keep the tapes secret from everybody, including his own lawyer who might, if he heard the tapes, have had an ethical obligation to disclose their contents. If, for example, the tapes established that Adams intended to or did perjure himself at Petitioner's trial, his attorney might well have been obliged not to remain mute. See Nix v. Whiteside, 106 S.Ct. 988 (1986). Indeed it is hard not to conclude that it is precisely because Adams' attorney does not want to find himself in that situation that he put the tapes away without listening to them. Even putting aside the question of perjury at

Petitioner's trial, the existence of Adams' contingent agreement with the government itself provided an incentive for Adams not to disclose the tapes if they would in any way undermine or contradict what he had told the government. Adams' successful suppression of the tapes is all the more perverse because, according to Adams and his attorney, the tapes were made only for disclosure to the government. The very fact that they have not been disclosed suggests that they could not help, but could well hurt, Adams' standing with the government. Yet Adams' behavior vis-a-vis his tapes, which may be the best evidence of what actually occurred, has been subject to no meaningful check whatsoever -- not by his own attorney, the government's attorney, or any court. Merely by claiming attorney-client privilege, the witness has buried potentially exculpatory evidence, with

the trial court's blessing. What makes this situation so extraordinary is that no officer of the court has acted as a check on Adams' self-serving act.

Plainly, had Adams on his own initiative made the tapes as a record of his activities on behalf of the government and later turned them over to his lawyer at the latter's request for possible future use, they would not have been any more privileged in the attorney's hands than they would have been in Adams'; they would not have been privileged at all. Cf. Fisher v. United States, 425 U.S. 391 (1976). Whether the fact that Adams' lawyer suggested to Adams that he make the tapes would or could change the result is far from clear. Moreover, the tapes apparently are a log, a diary, a record of facts and not, on their face, a communication to a lawyer of confidences. Presumably, Adams was also

reporting to the government what it was he was doing on its behalf; he said he was, and his agreement obligated him to do so. Those activities were in no sense "confidential," at least vis-a-vis Adams and the government.[10] The very purpose of the tapes was for disclosure to the government; if they were to serve Adams' purpose at all, they would have to have been disclosed in their entirety.

Finally, Adams' own treatment of the tapes is wholly inconsistent with his claim of privilege. He gave one of the tapes to the prosecutor. So far as is known, the tape, neither his first nor his last, was no different from any of the other tapes as to which he claimed privilege, except that it included, along with Adams' monologue, a telephone conversation Adams had had with

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[10]To the extent they were confidential, it would have been as part of a fraud on the government.

Kelly.[11] The attorney-client privilege is limited to communications between the attorney and the client which are intended to be confidential, and the undisputed facts in this case are inconsistent with an intent of confidentiality.

In any event, assuming arguendo that the tapes were originally confidential and privileged, a difficult question still exists as to whether the privilege was waived either by Adams' furnishing one of the tapes to the government or by his testifying at trial about the very events his tapes also concerned. A party claiming the attorney-client privilege has the burden of proving all elements of the privilege -- including the absence of any waiver. See, e.g., United States v. Jones,

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[11]The other tapes may also record conversations Adams had with Kelly or other third parties. Recordings of such conversations would plainly be outside the privilege.

696 F.2d 1069, 1072 (4th Cir. 1982). And partial disclosure of confidential communications waives the privilege with respect to the entire subject matter of those communications, including the "more detailed circumstances" relating to them and the underlying details. United States v. (Under Seal), 748 F.2d 871, 875 & n.7 (4th Cir. 1984). The privilege properly serves as a shield, not as a sword.

> [W]hen [the client's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

United States v. Aronoff, 466 F.Supp. 855, 862 (S.D.N.Y. 1979). As the Supreme Court of Rhode Island said in State v. von Bulow, 475 A.2d 995 (R.I.), cert. denied, 105 S.Ct. 233

(1984), in rejecting a claim of attorney-client privilege asserted by a lawyer retained by Mrs. von Bulow's son Alex to investigate his suspicions with respect to his mother's coma:

> The facts of the present case are a classic example of the impermissible selective use of privileged information. While maintaining that communications were intended to be confidential, Alex and his attorney, at Alex's direction, described information sufficient to trigger an investigation by the state and an indictment. The same parties later refused to disclose other evidence of the same communications. The impropriety of allowing the privilege holder in this case to disclose as much as he pleased while withholding the remainder is heightened by the fact that defendant was on trial for attempted murder. The effect of excluding such evidence was therefore to deny defendant access to information that he was entitled to examine in the preparation of his defense.

Likewise, the denial of Adams' tapes to the defense, where the prosecution was based on the very events Adams described on his tapes and on Adams' testimony about those events, denied the Petitioner due process of law.

The "right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965). While it serves symbolic ends, the right is "primarily a functional right that promotes reliability in criminal trials" and "advances the pursuit of truth." Lee v. Illinois, 106 S.Ct. 2056, 2062 (1986). The right to cross-examine, however, is an empty one if the cross-examiner is denied the tools he needs to test and probe the witness's credibility as to the very facts at issue.

Through cross-examination, Petitioner tried to show that Adams was not the kind of person who should be believed. He also tried to show that because of his contingency agreement with the government, Adams had a powerful motive to embellish, shade, or lie, in short, to do all he could to see that the Petitioner was convicted. What Petitioner lacked was the witness's own statements which could have contradicted the story he told at trial. In other words, while Petitioner could demonstrate that Adams should not be believed, he could not -- without Adams' tapes -- prove that Adams was lying.[12] Nor could he use the

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[12]The distinction is a crucial one. The government acknowledged that its witnesses, including Adams, were not good law-abiding citizens, but criminal drug dealers, and also that they were testifying pursuant to various deals with the government. The government argued that it could be no other way: upstanding citizens do not get involved in cocaine transactions and "deals" are "the way the game works." The prosecution however contended that the witnesses were telling the

(footnote continued)

information on the tapes which must have concerned in large measure Adams' meetings and conversations with Kelly to contradict and impeach Kelly.

The error in the refusal to compel production of the tapes went to the very heart of the case against Spector. Adams was the individual who set the scheme in motion. His testimony about Spector's alleged conversations and actions at the Marriott Hotel directly inculpated Spector. There can be no question that his testimony was important to the government's case. If it had not been important, the government would not have called Adams as a witness, especially in

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(footnote continued from previous page) truth in this case. The only way to rebut that contention effectively was to show that they were not, and the tapes could have shown that. Cross-examination designed to show Adams' bad character and motive to lie could not, for the government had essentially conceded all of that.

light of the fact that, by testifying, his ability to function as an informant came to an end.

Even if Kelly's testimony is deemed as or more important than Adams', Adams' tapes were still critical. Because the tapes necessarily recorded details of Adams' dealings with Kelly they could have served to impeach Kelly as well as Adams. For instance, they may have recorded a different chronology of events, putting the lie to Kelly's testimony about the times, places and details of his alleged conversations with Spector. In fact, the one tape that was made available to the defense (but only after Kelly had finished testifying) showed that Adams took the position that he had had a meeting with Kelly which Kelly's testimony indicated had not occurred. Thus, the tape showed that, as to this point, at least one of the two witnesses was lying or

mistaken. Without access to the tapes, it cannot be known what other "mistakes" or lies the suppressed tapes would have exposed.

The trial court never weighed Spector's need for the tapes against countervailing considerations, and thus made no determinations concerning the importance of the witnesses' testimony and of the potentially exculpatory tapes. Further, finding no error in the ruling on privilege, the appeals court never evaluated the impact of the error. It is true that, in rejecting the claim that the government's contingency agreement with Adams itself violated Spector's due process rights, the Court of Appeals characterized Adams' testimony as not "critical" to the conviction. But if the importance or lack of importance of Adams' testimony is relevant to Petitioner's claim that he was entitled to access to the tapes,

and to the appropriate remedy, both the critical-not critical standard and its application were improper. First, as demonstrated above, Adams' testimony was crucial. Moreover, the usefulness of his tapes was not limited to impeaching him. And, if Petitioner is correct that his Constitutional rights were violated by the refusal to order production of the tapes, then the conviction could be affirmed only if the error were harmless beyond a reasonable doubt. United States v. Agurs, 427 U.S. 97, 113 (1976).

Of course, neither the trial court nor the appeals court purported to determine the potential importance of the suppressed tapes in the context of this case, for both courts stopped their analyses at the point where they found the tapes "confidential" and thus privileged. Petitioner submits that the

ruling was error and that the error could not be deemed harmless beyond a reasonable doubt. Assuming that it was Kelly's testimony which was "critical," the tapes may have been used to contradict him and to show the jury that he was wholly unworthy of belief. And even assuming that the tapes would have been useful only to impeach Adams, Adams may well have been the witness whose testimony led the jury to convict. At the times in issue, Adams was, after all, working in partnership with the government. He may have been perceived by the jurors to carry the government's seal of approval. Thus, the jury may well have rejected Kelly's testimony, but believed Adams and convicted Petitioner on the basis of the testimony he gave.

That the jury deliberated for over eight hours strongly suggests that the case, to the jury, was a difficult and close one. Because

the only real question in the case was the credibility of the prosecution's witnesses, the error plainly cannot be deemed harmless.

Whether denial of the tapes, undoubtedly powerful ammunition for cross-examination, was both compelled by the federal common law attorney-client privilege and consistent with Petitioner's Constitutional rights are important questions for both Petitioner and for the criminal justice system. How these questions are answered -- indeed whether they are addressed by this Court -- may determine whether a defendant who vigorously asserts his innocence and who has never been previously convicted or even arrested must serve a lengthy prison sentence. It may also determine whether prosecutors will continue to make contingency deals which often encourage

perjury, and whether they will join in the suppression of potentially exculpatory evidence as the prosecutor did in this case.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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October 10, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2493

United States of America,*		
	*	
Appellee,	*	Appeal from the
	*	United States
v.	*	District Court
	*	for the Eastern
Bayard Spector,	*	District of
	*	Missouri.
Appellant.*		

Submitted: March 12, 1986
Filed: June 16, 1986

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOODS,* District Judge.

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*The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, sitting by designation.

WOODS, District Judge.

Bayard Spector appeals from a conviction following a jury trial on charges involving a conspiracy to distribute cocaine.[1] For reversal, Spector argues that the district court[2]: (1) erred in submitting the case to the jury on a single conspiracy theory; (2) erred in submitting the alleged violation of the Travel Act (18 U.S.C. §1952) to the jury; (3) violated his fifth amendment right of due process by allowing testimony of a government informer; (4) violated his sixth amendment right of confrontation by restricting cross-

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[1]Spector was convicted on two counts: one of conspiring to distribute and possess cocaine with intent to distribute in violation of 21 U.S.C. §§841(a)(1) and 846; and one of traveling in interstate commerce to promote this activity in violation of 18 U.S.C. §1952(a). He was sentenced to eleven years on the conspiracy count and five years on the travel count to be served concurrently.

[2]The Honorable Edward L. Filippine, United States District Court for the Eastern District of Missouri.

examination of the government informer; and (5) erred in refusing to instruct the jury regarding the testimony of alleged perjurers. We affirm.

George Kelly, Jr., a co-defendant who pleaded guilty to the conspiracy, testified he approached Spector in April, 1984 about serving as one of the principal suppliers of 25 kilos of cocaine which were to be delivered to purchasers in the St. Louis area every six weeks at $50,000 a kilo. Kelly had previously approached a drug dealer named Bruce Cohen (also indicted in this conspiracy but presently a fugitive) about supplying the entire amount. Cohen wanted a $200,000 deposit which the St. Louis contact was unwilling to furnish.

Unbeknownst to Kelly, the St. Louis contact was a DEA informant named Joe Adams. Adams had been apprehended in connection with

drug transactions and through his attorney had entered into a written agreement with the government to cooperate in the investigation of drug trafficking. In return the government gave Adams, his family, and his girl friend use immunity and agreed not to prosecute his family or girl friend for past crimes. The agreement contained the following provision concerning Adams:

> The Government will carefully and in good faith consider and evaluate Mr. Adams' cooperation and the information he provides in making its determination whether or not to reduce or forgo [sic] some or all of the aforesaid maximum charges and imprisonment exposure. In short, this Office will review in good faith the extent and value of Mr. Adams' information and cooperation as it relates to successfully solving and prosecuting crimes. The more important we deem that information and cooperation, the more likely the reduction of charges and his sentencing risk.

(Appellant's brief at Appendix 2). In no event was Adams to be indicted for crimes carrying punishments totaling more than 45 years.

According to the testimony, Adams went to Miami and interested Kelly in the St. Louis deal. After Cohen reneged on supplying all the cocaine without the above-mentioned deposit (Cohen did agree to furnish two kilos), Kelly approached Spector. Spector initially agreed to furnish the entire amount but later reduced his commitment to five kilos. Co-defendants Phil Rima and Vinson Rood were contacted by Kelly and they agreed to furnish small amounts of cocaine for the St. Louis deal. Part of the cocaine was to be driven to the Ramada Inn across the river in Illinois; the rest was to be brought by the suppliers to the Marriott Hotel in St. Louis where they would meet and complete the

transaction. Vinson Rood stayed at the Ramada Inn with the cocaine supplied by Rima and Cohen. Kelly, Adams, Rima, and Spector met at the Marriott Hotel on Tuesday, May 1, 1984.

Upon entering the hotel suite, Spector immediately pulled Rima into a side bedroom and asked if everything was okay, if it was a setup, and if the room was bugged. Then they returned to the main room and discussed with the others how the deal would take place. Spector wanted to see Rima paid first and leave with his money. Rima, Kelly, and Adams all testified that Spector expressed a desire at the time to be a part of future deals. Shortly thereafter Spector saw a transmitter in the pocket of Adams' jacket and ran from the room. He was arrested soon after he left the hotel. No cocaine was found on his person or in his hotel room. Kelly and Rima testified against the appellant who did not

take the stand. They pled guilty to one count each as did Rood. In Spector's favor, an official employed by Monsanto testified he had an appointment to see Spector on business in St. Louis on May 2, 1984.

These facts provided the basis for the three count indictment and Spector was convicted by a jury on two counts. This appeal followed.

I.

Appellant claims the district court erred in submitting the case to the jury on a single conspiracy theory since the evidence disclosed multiple conspiracies. If multiple conspiracies were proved, it is true that an accused's rights may be affected by the introduction of evidence of crimes unrelated to the defendant. See United States v. Jackson, 696 F.2d 578 (8th Cir. 1982), cert. denied, 460 U.S. 1073 (1983). Appellant

relies on Kotteakos v. United States, 328 U.S. 750 (1946) to support his multiple conspiracy argument. A singly quotation from that case shows that it is inapposite. "We do not think that either Congress...or this Court... intended to authorize the Government to string together for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all." Id. at 773.

No such groupings of multiple conspiracies existed here. There was a single conspiracy to periodically introduce a large quantity of cocaine into the St. Louis area. The fact that the individual defendants agreed to contribute a portion of the total quantity to the suppliers did not convert the conspiracy from single to multiple status. The fact "that a number of separate

transactions may have been involved ... does not establish the existence of a number of separate conspiracies." Id. at 799, citing United States v. Parnell, 581 F.2d 1374, 1382 (10th Cir. 1978), cert. denied, sub nom., Cox v. United States, 439 U.S. 1076 (1979).

In United States v. Standridge, 770 F.2d 744 (8th Cir. 1985), this court rejected an argument similar to that made by appellant herein. "[A]t the time this operation was commenced by Woody Standridge, the objectives of the operation were to produce ... counterfeit twenty-dollar bills. Those objectives did not change when ... defendants joined the scheme by providing operation capital." Id. at 746. The court went on to quote from United States v. DeLuna, 763 F.2d 897, 918 (8th Cir. 1985) as follows: "To resolve the question of whether the government's proof showed that one or multiple

conspiracies existed, we must determine 'whether there was one overall agreement to perform various functions to achieve the objectives of the conspiracy.'" 770 F.2d at 746 (citations omitted). Here the conspirators sought to furnish 25 kilos of cocaine to the St. Louis buyer every six weeks and agreed to individual participation in that plan. Appellant's multiple conspiracy argument, therefore, is devoid of merit.

II.

Appellant contends there was no illegal business enterprise or continuous course of conduct as required by the Travel Act, 18 U.S.C. §1952 (1982). However testimony established that appellant had been involved in a previous drug deal with George Kelly, that he was deeply involved in the present deal, and that he wanted to be included in future drug trafficking in the St. Louis area.

Spector traveled from Florida to St. Louis not only to effectuate the present drug deal but to solidify his part in future deals in the St. Louis area. Without question there was ample evidence to sustain a Travel Act conviction. See, e.g., United States v. Krevsky, 741 F.2d 1090 (8th Cir. 1984) (evidence of past and future plans for the distribution of drugs and of an ongoing enterprise involving the distribution of drugs was sufficient to establish that the conspiracy charge was not just an isolated incident and was instead a continuous course of conduct). See also United States v. Davis, 665 F.2d 195 (5th Cir. 1982).

Apellant also claims there was no overt act in furtherance of the enterprise. Such a contention overlooks the fact that Spector traveled from Florida to Missouri where he met with his co-conspirators and engaged in

negotiations related to the instant sale as well as future transactions. See United States v. Travelman, 650 F.2d 1133 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982) (holding that a continuous enterprise and one act in furtherance thereof is all that is required to support a Travel Act conviction). We hold there was sufficient evidence to support the jury verdict on the Travel Act count.

III.

The appellant strongly urges that the written agreement between the government and Adams violated his right of due process. However, Adams' testimony had very little to do with the conviction of Spector. The most damaging testimony was given by Kelly and Rima, his co-defendants. The conspiracy was far advanced before Adams laid eyes on Spector in the short meeting at the Marriott Hotel in

St. Louis. Spector's dealings were almost entirely with Kelly, not with Adams. As this court said about a similar claim on an alleged contingent agreement with a witness, the appellant "failed to demonstrate how [the informant's] testimony was critical to his conviction." United States v. Fazzino, 765 F.2d 125, 126 (8th Cir. 1985), cert. denied, 106 S.Ct. 150 (1985).

Appellant in his due process argument relies heavily on the panel decision in United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984). However, that decision has no precedential value since it was vacated in an en banc decision affirming the district court by an evenly divided 4-4 vote. United States v. Fazzino, 765 F.2d 125 (8th Cir. 1985), citing United States v. Dailey, 759 F.2d 192 (1st Cir. 1985).

In the Fazzino case this court rejected a due process argument involving a witness under investigation for mail fraud who allegedly cooperated with the government pursuant to a "de facto contingency agreement" whereby the outcome of any criminal prosecution against the witness would depend on the quality of the evidence he obtained against Fazzino.

What was said about the lack of factual similarities between Waterman and Fazzino is equally true of Waterman and the present case. The plea agreement in Waterman included a government promise to recommend a two-year reduction in the accomplice's sentence if his "truthful testimony led to further indictments." 732 F.2d at 1530. The agreement herein spoke in terms of "solving and prosecuting crimes." It should be noted that in Dailey, supra, "the district court characterized the contingency involved here as

the achievement of successful prosecutions." 759 F.2d at 197. If we consult Dailey because of the factual similarities and this court's reliance upon it in Fazzino, we find an exhaustive review of authorities upholding contingency agreements similar to that made with Joe Adams.[3] Of particular relevancy is

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[3]The informant's anticipated receipt of $1,000, if his testimony resulted in a conviction, did not render him incompetent to testify. United States v. Valle-Ferrer, 739 F.2d 545, 549 (11th Cir. 1984). Testimony of an accomplice who had been the beneficiary of a generous plea agreement was admitted, even though he was a thief, perjurer, and convicted felon. United States v. Miceli, 446 F.2d 256 (1st Cir. 1971). Testimony of an unsentenced accomplice who had pled guilty was permitted in United States v. Borman, 437 F.2d 44 (2d Cir. 1971), cert. denied, 402 U.S. 913 (1971). In Heard v. United States, 414 F.2d 884 (5th Cir. 1969), the court approved the admission of testimony from an informant who was a convicted felon and who had been paid for results rather than information. Testimony of an undercover agent was allowed even though the amount of compensation was to be determined after trial "on basis of an appraisal of extent and quality of [their] work." United States v. Crim, 340 F.2d 989 990 (4th Cir. 1965). "[A] conviction may be based on the uncorroborated testimony of an

(footnote continued)

the case of United States v. Kimble, 719 F.2d 1253 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984) where an accomplice pled guilty and agreed to testify with the understanding that he would be sentenced to 20 years imprisonment if his cooperation was considered adequate. The Court of Appeals for the Fifth Circuit held the existence of the plea agreement affected the weight of the testimony and not its admissibility.

Since its decision in Fazzino, supra, this court decided United States v. Moeckly, 769 F.2d 453 (8th Cir. 1985) where the testimony of a witness was attacked because "he testified pursuant to a plea bargain and feared prosecution." Id. at 462. This court rejected such a basis for exclusory testimony

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(footnote continued from previous page) accomplice ... even though the accomplice is in a position to gain favors from the government by his testimony." Lyda v. United States, 321 F.2d 788, 794 (9th Cir. 1963).

but pointed out that these circumstances could be used for impeachment on cross-examination. The court pointed out in Moeckly that there was an abundance of other evidence to establish the conspiracy and Moeckly's awareness of its "essential object." Id. at 463. In the present case Adams was extensively cross-examined about his past history and his agreement with the government. The same is true of the case against Spector. Even if Adams had not taken the stand, the government had a strong and persuasive case against Spector.

IV.

The appellant contends that his sixth amendment right of confrontation was violated when the district court refused to compel Joe Adams, the informant, to give his address in open court. He relies on Smith v. Illinois,

390 U.S. 129 (1968). In that case, however, the witness failed to give both his correct name and his address. We agree with the following reasoning in United States v. Teller, 412 F.2d 374, 380 (7th Cir. 1969), cert. denied, 402 U.S. 949 (1971):

> Smith does not per se require a new trial merely because the district court sustained an objection to a question seeking to elicit Washington's address. Smith requires reversal only where the lack of a witness's name and address denies a defendant an opportunity to effectively cross-examine a witness. When this happens, a defendant is denied his Sixth Amendment right to confrontation. However, the initial question is whether the defendant was denied effective cross-examination. It is clear from the recital of Washington's testimony that the district court did not unduly limit cross-examination of Washington's past record.

Here as in Teller the witness was cross-examined in great detail. He testified as to his current residence in St. Louis County, that he had lived off and on in Miami, Florida

since 1973. He admitted to being a drug dealer and body guard for drug dealers. A review of the wide-ranging cross-examination of Adams disclosed an extensive knowledge of his background. Appellant clearly had ample opportunity to identify this witness with his environment. In United States v. Mesa, 660 F.2d 1070, 1075 (5th Cir. 1981), the court made the following comment which is applicable herein: "The critical question in deciding if a witness must divulge his address is whether or not the defendant has been given sufficient opportunity to place the witness in his proper setting. This determination is committed to the sound discretion of the trial court." Id. at 1075 (citations omitted). For a similar holding, see United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973), cert. denied, 415 U.S. 915 (1974).

Appellant has failed to demonstrate prejudice in the court's refusal to require Adams to divulge his address in open court. Government counsel offered to provide the information privately, but defense counsel did not take advantage of the offer. (T. Vol. 3, p.96).

In holding that the right to ask a witness to give his address was not absolute, this court in Caldwell v. State of Minnesota, 536 F.2d 272, 274 (8th Cir. 1976) made the following significant statement:

> The record in this case contains evidence that disclosure of Klabunde's address and place of employment might have posed a threat to his safety. It also reveals that Caldwell had an ample opportunity to place Klabunde in his proper environment so that the jury might evaluate his testimony. Caldwell has asserted no particularized need for the disclosure of Klabunde's residence and workplace. Under these circumstances, we hold that he was not denied this right to confrontation.

In view of the circumstances surrounding the testimony of Adams and the full content of his testimony, the trial judge did not abuse his discretion in refusing to force Adams to divulge his current address in open court.

V.

Appellant makes other arguments which may be treated summarily. During the course of Adam's cross-examination, it was revealed that Adams had made some tapes at the direction of his attorney to assist the latter in his representation of Adams as a potential defendant. Government counsel did not know the contents of those tapes, and never had them in their possession, and strongly deny they ever knew such tapes existed prior to the cross-examination of Adams. The tapes were sealed at the office of Adams' attorney. There is no indication of an intention that these tapes be disclosed to a third party.

As was recognized in United States v. (Under Seal), 748 F.2d 871 (4th Cir. 1984), the attorney-client privilege protects "communications not intended to be disclosed to third persons other than in the course of rendering legal service to the client." Id. at 874. The court relied on Supreme Court Standard 503(a)(4), which states in pertinent part: "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client." Although Congress did not adopt this rule, courts have relied upon it as an accurate definition of the federal common law of attorney-client privilege, as this court specifically noted in Citibank, N.A. v. Andros, 666 F.2d 1192, 1193 n.6 (8th Cir. 1981). "Consequently, despite the failure of Congress to enact a detailed

article on privileges, Standard 503 should be referred to by the Courts." 2 J. Weinstein, Evidence ¶503[02] at 503-17 (1975). The trial court did not err in quashing the subpoena for the sealed tapes in the possession of Adams' attorney.

Appellant claims error in the refusal of the court to instruct that "the testimony of an admitted perjurer should always be considered with caution and weighed with great care." This requested instruction was based upon a Florida statute §837.05 reading as follows: "Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of misdeameanor of the first degree, punishable as provided in §772.082, §775.083, or §775.084." Kelly and Rima admitted to having told untruths to Florida law enforcement officials. Although it is

compiled under the "perjury" chapter of the Florida statutes, the statute does not state that this misdemeanor offense constitutes perjury. There is no comparable federal statute or Missouri statute. The witnesses were not charged in Florida with its violation. This is a matter of credibility for the jury to consider and we find no error in the court's refusal to give the proffered instruction.

Appellant also claims that his counsel should have been permitted to question Adams about other investigations unrelated to the instant conspiracy. Clearly, the imposition of such a restriction was within the discretion of the trial judge. Cross-examination of Adams was broad and free-wheeling. The trial court had not only the right but the duty to keep it within reasonable bounds.

We affirm the judgment of conviction.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. I believe that Spector's right to due process was violated by the government's use of a witness whose agreement with the government was contingent upon the successful prosecution of crimes, and by the government's failure to produce Jencks material.

Athough an agreement granting government favors to a prosecution witness in return for truthful testimony is not per se improper, see United States v. Librach, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976), there must be some limits to the scope of such agreements. In 1962, the Fifth Circuit held that without some "justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against

particular named defendants as to crimes not yet committed." Williamson v. United States, 331 F.2d 441, 444 (5th Cir. 1962). Judge John R. Brown stated in his concurrence that "[w]hat we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough -- it is just too much." Id. at 445 (Brown, J., concurring specially). I believe that the government's contingent agreement with Adams was "just too much."

In United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984), cert. denied, 105 S.Ct. 2138 (1985), a panel of this Court held that the government cannot offer favorable treatment to a witness contingent upon the success of prosecution. Although this Court, sitting en banc, vacated that decision, we, "by ultimately dividing evenly, ... served notice that benefits made contingent upon

subsequent indictments or convictions skate very close to, if indeed they do not cross, the limits imposed by the due process clause." United States v. Dailey, 759 F.2d 192, 201 n.9 (1st Cir. 1985).

In the case now before us, however, it is apparent that the government has decided not to heed this notice, as its arrangement with Adams went even further than the one in Waterman. In Waterman, the government's witness only provided testimony regarding accomplished facts, whereas, in this case, Adams not only testified regarding accomplished facts, but also set up the underlying criminal activities.[1]

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[1] The panel in Waterman pointed out that it was not faced with the situation of a paid informant who might be more likely to entrap a defendant because of the contingent nature of her or his compensation. Nor do the facts before us resemble government participation in illegal activity with a defendant prior to (footnote continued)

Additionally, the interest Adams had in Spector's conviction was much greater than the witness's interest in Waterman. In the latter case, the witness agreed to testify in return for a mere recommendation of a two-year sentence reduction. In this case, in exchange for him "providing truthful information to and complete cooperation with United States law enforcement agencies in any matter in which he is asked about," the government agreed to provide immunity for Adams, his parents, his children, and his girlfriend from criminal charges arising out of information Adams provided or out of any other investigations currently being conducted. The government

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(footnote continued from previous page)
trial through undercover agents or paid informants which, although not technically entrapment, is so outrageous as to deny the defendant due process of law.

Waterman, 732 F.2d at 1530 (citations omitted).

also agreed to limit Adams's maximum penalty exposure for indictments arising from current or previous investigations to forty-five years.[2] Most importantly, the government stated that it would consider reducing or

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[2]The government agreed to limit any indictments to:

1) Two charges of violating 21 U.S.C. §841(a), with a maximum exposure of fifteen years per charge. (The usual exposure for a violation of this statute forbidding persons to manufacture, distribute, or dispense, or to possess with intent to manufacture distribute, or dispense a controlled substance would be up to twenty years imprisonment or a fine of up to $250,000, or both. See 21 U.S.C. §841(b).

2) A maximum exposure of ten years for any charges under 26 U.S.C. §§7201 (tax evasion) or 7206(1) (perjury). (The standard exposure for a violation of §7201 is not more than five years or a fine of not more than $100,000, or both. The standard exposure for a violation of §7206(1) is up to three years or up to $100,000, or both.)

3) A maximum exposure of five years for any charges brought within the above indictments pursuant to Title 31 (Money and Finance).

The fact that limiting his criminal exposure to forty-five years could be considered a

(footnote continued)

foregoing entirely even this limited exposure after reviewing "the extent and value of Mr. Adams' information and cooperation as it relates to successfully solving and prosecuting crimes. The more important we deem that information and cooperation, the more likely the reduction of charges and his

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(footnote continued from previous page) bargain is not surprising considering Adams' recent activities. Adams testified that he had been working as a "collector" and bodyguard for drug dealers. He stated:

> Specifically I was a man tracker and investigator. If they had a collection problem where somebody might have skipped town without paying for a large amount of drugs or their life was in a situation due to the drug wars among themselves, I would handle the investigation myself, track down the people all over the country and provide security also in Miami in case there was a life threat by the dealers.

Tr. at 3-33.

He also admitted that he bought and sold cocaine himself.

sentencing risk."[3] Tr. at 3-42 (emphasis added). I, along with the First Circuit, "can think of no instance in which the government would be justified in making a promised benefit contingent upon the return of an indictment or a guilty verdict." See Dailey, 759 F.2d at 201.

Given the serious credibility questions raised by the contingent nature of Adams' agreement with the government, it is especially troubling that Spector was denied access to the taped diaries Adams made of his activities for the government.

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[3]Although the agreement required Adams to provide only truthful information, this requirement was largely meaningless considering the great incentive to fabricate evidence. Additionally, there were, practically speaking, no real means of verification -- the corroborating witnesses were required under their own plea agreements to cooperate with the prosecution.

In my opinion, the tapes were Jencks material. The district court, after an in camera review of one of the tapes, stated that "[t]he tape has been turned over in its entirety as Jencks material of the witness Adams." Tr. at 3-11. There was apparently nothing to distinguish the tape turned over to Spector from the other tapes. The tape produced was, like the others, a daily diary of Adams' activities on the government's behalf. It was neither the first nor the last tape made. The only difference appears to be that, although the government knew Adams was recording a daily diary,[4] see Tr. at 3-123,

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[4]It is interesting to note that in spite of the fact that Adams testified that the government's agents knew during the investigation that he had been taping daily notes, the government claims to have only found out about the tapes "[d]uring the course of Adams' cross-examination." Brief of Apellee at 22. This claim would not explain how the government obtained the one tape. Either the government asked Adams for the tape, or Adams handed it over out of the blue. (footnote continued)

it only requested the tape containing a particular telephone conversation between Adams and Kelly. See Tr. at 3-10.

The government argues that the attorney-client privilege shields the tapes from production, in spite of the fact that it admitted the "possibility that the tapes would be disclosed" to the government, Brief of Appellee at 25, and that one, in fact, has been disclosed. As the government acknowledges,

> A communication is "confidential" if not intended to be disclosed to third persons other than those to

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(footnote continued from previous page)
If the former were the case, the government would have had prior knowledge of that tape and, presumably, of the others. If Adams just handed them the tape, it only seems logical that the government would have asked why it had been made and would have learned of the others.

Adams' testimony also disposes of the government's argument that the tapes are not within the Jencks Act because Adams' diary was "not disclosed to government agents and attorneys." Id. at 24.

whom disclosure is in furtherance of the rendition of professional legal services to the client.

Id.

Although Adams claimed that he did not know why he was recording the diaries, his testimony made the purpose apparent:

> Q. Would it be fair to say that during this investigation and work that you were doing, that you were very, very concerned that you'd get full credit for all the -- for successfully solving crimes? You didn't want to solve a crime that you didn't get credit for so you -- somehow you would report it, didn't you, as soon as you did something?
>
> A. Oh yes.
>
> Q. Didn't you keep a personal log of this, because you probably couldn't trust the government necessarily?
>
> A. I don't trust the government, I trust Tom Dittmeier.

Tr. at 3-118.

Even if the tapes were originally protected by the attorney-client privilege, any privilege was waived when Adams told the

government about the tapes and delivered one to it. In United States v. Cote, 456 F.2d 142 (8th Cir. 1972), this Court stated:

> Notwithstanding our recognition that the attorney-client privilege attached to the information contained in the accountant's workpapers under the circumstances existing here, we find that by filing the amended returns the taxpayers communicated, at least in part, the substance of that information to the government, and they must now disclose the detail underlying the reported data. A client may waive the privilege which protects what he earlier confided to his attorney or his attorney to him. See 8 Wigmore, Evidence §2327 (McNaughton Rev. 1961). Here, Cote, the accountant, testified that the information on his workpapers was later transcribed onto the amended returns which were filed by the taxpayers with the government. This disclosure effectively waived the privilege not only to the transmitted data but also as to the details underlying that information. As stated in United States v. Tellier, 255 F.2d 441, 448 (2d Cir. 1958), cert. denied, 358 U.S. 821, 79 S.Ct. 33, 3 L.Ed.2d 62: "[T]he privilege attaches to the substance of a communication and not to the particular words used to express the communication's content." See also United States v. Shibley, 112

> F.Supp. 734, 742 (S.D. Cal. 1953). Cf. Rule 5-11, Proposed Rules of Evidence, supra note 2 [disclosure of "any significant part" of a communication waives the privilege]; 8 Wigmore, supra, §2327 at 638 [the "doctrine of completeness" is analogous to this principle]; McCormick, Law of Evidence §93 (1954).

Cote, 456 F.2d at 144-45 (footnotes omitted).

Even assuming, arguendo, that the tapes were privileged, and that there was no waiver, I would reverse on this issue. "It is clear that government witnesses have a right to assert the attorney-client privilege on cross-examination. However, where assertion of the privilege unduly restricts a defendant's cross-examination, the witness' direct testimony may have to be stricken. United States v. Coven, 662 F.2d 162, 170-71 (2d Cir. 1981) (citations omitted), cert. denied, 456 U.S. 916 (1982).

I believe that Adams' testimony should not have been allowed under any circumstances, given the great incentive to fabricate evidence that the contingent agreement provided. To compound this failure, the district court severely restricted Spector's ability to attack Adams' credibility on cross-examination, by denying access to tapes which dealt with the exact matters about which Adams testified. Accordingly, I would reverse.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2493-EM

United States of America,*		
Appellee,	*	Appeal from the
vs.	*	United States
Bayard Spector,	*	District Court
Appellant.	*	for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 15, 1986

SUPREME COURT OF THE UNITED STATES

NO. A-174

BAYARD SPECTOR,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 13, 1986.

/s/ Harry A. Blackmun
Associate Justice of the
Supreme Court of the
United States

Dated this 8th day
of September, 1986